Supreme Court, U.S.
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No. 92-215

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOHN L. BROOKS, *et al.*,

Petitioners,

v.

HILTON CASINOS, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the discretionary refusal of the court of appeals to certify a hypothetical point of state law at the request of litigants who opposed certification of any issue until they lost in the court of appeals and who sought certification for the first time on rehearing warrants review by the Court?

2. Whether the decision of the court of appeals of an intensely fact-bound issue of state law warrants review by the Court?

3. Whether a routine exercise by the court of appeals of its duty to ascertain and apply state law to determine whether there was sufficient evidence to send a state law claim to the jury warrants review by the Court?

4. Whether an untimely and frivolous challenge to the qualifications of a federal appellate judge that was summarily rejected by the other two members of the panel warrants review by the Court?

LIST OF PARTIES

Pursuant to Rule 29.1, respondent Hilton Casinos, Inc. is the wholly owned subsidiary of respondent Hilton Hotels Corporation.

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9 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2254 p. 541 (West 1971) 21

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H.R. Rep. No. 1453, 93d Cong. 2d Sess., *reprinted in* 1974 U.S. Code, Cong. & Admin. News 6355 28

R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986) 9,18,19,24

RESPONDENTS' BRIEF IN OPPOSITION

The Ninth Circuit's decision, and therefore this petition, begins and ends in the 167-volume trial court record and in Nevada law. This Court does not independently determine but defers to the courts of appeals on matters of state law and evidentiary sufficiency, unless it can be said that a court of appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 10.1(a). Nothing calling for the exercise of supervisory power is remotely involved here. The Ninth Circuit correctly determined and applied Nevada law. Petitioners' half-hearted challenge to the qualifications of the author of the opinion below, Judge Kozinski, demonstrates that, in truth, they know that this is so. The petition should be denied.

I. COUNTER-STATEMENT OF THE CASE

The Ninth Circuit's opinion, reported at 959 F.2d 757, is simpler and more straightforward than petitioners' partial account of it suggests. Petitioners dealt cards and ran casino games at the Las Vegas Hilton. They had no written contracts of employment. After they were terminated, they brought suit in federal district court.

At trial, petitioners sought damages under the ADEA and Title VII and presented three state law claims: breach of contract; bad faith discharge; and intentional infliction of emotional distress. Before oral argument in the Ninth Circuit, Hilton paid petitioners more than $3.2 million in back pay, interest, and attorney's fees on their ADEA and Title VII claims.[1] Hilton's payment rendered moot

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[1] Hilton also conceded that, were the state-law-based punitive damage award to be reversed, liquidated damages equal to the ADEA back pay award—$1.4 million—would be proper. Based on this concession, the Ninth Circuit sustained petitioners' and the EEOC's cross-appeal of the District Court's denial of liquidated damages. Pet. App., at 23-24, 959 F.2d, at 767. The correctness of the lower courts' rulings on liquidated damages is therefore not before the Court and would not be ripe unless the jury's punitive damage verdict were reinstated.

petitioners' breach of contract claims, because they supported the same back pay and interest awards as the satisfied federal claims. This left the Ninth Circuit with petitioners' alternative claims to tort damages for bad faith discharge and intentional infliction of emotional distress.[2]

As the majority correctly observed, Pet. App., at 6, 959 F.2d, at 759, Nevada law presumes employment to be at will in the absence of a written contract. *Vancheri* v. *GNLV Corp.*, 777 P.2d 366, 368 (Nev. 1989). To overcome this presumption, an employee must prove "either an express or an implied contract that she would only be terminated for just cause." *Bally's Grand Employees' Federal Credit Union* v. *Wallen*, 779 P.2d 956, 957 (Nev. 1989).

In matters of contract, Nevada follows the common law. An implied contract, equally with an express contract, requires an "ascertainable agreement." *Smith* v. *Recrion Corp.*, 541 P.2d 663, 665 (Nev. 1975). A party does not have a contract merely because he expects the other to perform; the other must by his words or conduct have shown he promised to perform. *Warrington* v. *Empey*, 590 P.2d 1162 (Nev. 1975). In Nevada,

> the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs,—not on the parties' having *meant* the same thing but on their having *said* the same thing.

Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 464 (1897) (emphasis in original), *quoted with approval in Hotel Riviera, Inc.* v. *Torres*, 632 P.2d 1155, 1157 (Nev. 1981), and in the opinion below, Pet. App., at 18, 959 F.2d, at 764.

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[2] Petitioners' bad faith discharge and intentional infliction claims rest on identical facts and support identical damages. As petitioners candidly admitted to the trial court, the "only reason" they pleaded intentional infliction of emotional distress was to provide "alternate theories to get to the same damages" should their bad faith discharge claims be disallowed. RT XXXVIII 58-59.

Here, the Ninth Circuit faithfully followed Nevada law. It stated the applicable presumption, canvassed the record, and identified the facts offered to rebut the presumption:

> Plaintiffs were not employed under a written employment contract. Under Nevada law, the absence of a written contract gives rise to the presumption that employment is at will. *See Vancheri v. GNLV Corp.*, 105 Nev. 417, 777 P.2d 366, 368 (1989) (per curiam). Plaintiffs had the burden of rebutting this presumption by establishing that they were employed under a contract terminable only for just cause. Plaintiffs' evidence fell into four broad categories: (1) plaintiffs' longstanding satisfactory employment with Hilton; (2) inducements extended by Hilton to retain plaintiffs, including employee benefits and a retirement plan that were among the best in the industry; (3) a progressive disciplinary system, and a past practice of terminating employees only in accordance with this system; and (4) assurances and representations by Hilton's management that plaintiffs were part of the "Hilton family" and would have their jobs as long as they performed them satisfactorily.

Pet. App., at 6-7, 959 F.2d, at 759-60.

The Nevada Supreme Court has applied the at-will presumption nine times over the last ten years. Its cases teach that Nevada employers do not give up the at-will presumption based on factors as ubiquitous and inconsequential as those petitioners identified here. *See* Pet. App., at 8 n.2, 959 F.2d, at 760 n.2 (observing that no Nevada case supports petitioners' argument that longevity creates an implied contract of continued employment); *Vancheri*, 777 P.2d, at 369-70 (neither does calling an employee "part of the family" and establishing and following a progressive discipline system); *Bally's Grand*, 779 P.2d, at 958 n.2 (similar to *Vancheri*, except that in *Bally's Grand* the supervisor also testified that his policy was not to terminate

employees "except for some failure to perform");[3] *Smith* v. *Cladianos*, 752 P.2d 233, 235 (Nev. 1988) (Nevada employers who distribute handbooks listing employment do's and don'ts do not lose the presumptive legal right to hire and fire at will); *Sands Regent* v. *Valgardson*, 777 P.2d 898, 899 (1989) (to like effect as *Smith*).[4]

Based on this body of Nevada law and its careful review and explication of the massive record before it, the majority correctly concluded that "the evidence presented was insufficient as a matter of Nevada law to create an implied contract [of continued employment] and thus never should have been submitted to the jury." Pet. App., at 20, 959 F.2d, at 765.

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[3] Citing Vol. IX, pages 100 & 109 of the trial transcript, petitioners misrepresent that there was an "undisputed admission from Hilton's own CEO and chairman of the board that the employer [Hilton] itself, at the time petitioners were hired, understood and agreed that the relationship was *not* one in which the employees could be terminated without a 'just and fair reason.' " Pet., at 11-12 (emphasis in original). The testimony cited refers to Barron Hilton's personal practice, as followed by him in terminating former Notre Dame coach Frank Leahy as general manager of the San Diego Chargers, and does not speak to any agreement or understanding Hilton may have had with petitioners the time they were hired. Even if it did, moreover, *Bally's Grand* holds this kind of normal reluctance to engage in periodic, random firings—merely to be sure the at-will presumption remains intact—to be without promissory or contractual significance in Nevada.

[4] Other Nevada at-will cases include: *Beales* v. *Hillhaven, Inc.*, 825 P.2d 212 (Nev. 1992); *D'Angelo* v. *Gardner*, 819 P.2d 206 (Nev. 1991); *American Bank Stationery* v. *Farmer*, 799 P.2d 1100 (Nev. 1990); *Stone* v. *Mission Bay Mortgage Co.*, 672 P.2d 629 (Nev. 1983); *Southwest Gas Corp.* v. *Ahmad*, 668 P.2d 261 (Nev. 1983). Unlike those cited in the text, these cases involved elements of an *express* contract, *i.e.*, a contract based on definite written or spoken promises, not one said to be *implied* from the parties' conduct. *K Mart Corp.* v. *Ponsock*, 732 P.2d 1364 (Nev. 1987), does not address the at-will presumption, although the dissenting opinion of Judge Boochever discusses the case as if it did. Pet. App., at 29, 959 F.2d, at 775. The employer in *K Mart* stipulated that the employee could not be terminated except for the reasons and according to the procedures stated in its handbook. 732 P.2d, at 1366 n.1. In this case, the parties stipulated that petitioners were *not* terminated for handbook violations. CR 432, Inst. 26 ¶¶ 9 & 10.

In Nevada, as in most States, tort liability does not attach to the act of terminating an at-will employee absent an independent offense to public policy. *See, e.g., Wiltsie* v. *Baby Grand Corp.*, 774 P.2d 394 (Nev. 1984). In this case, petitioners pursued no public policy tort, Pet. App., at 20-21 n.6, 959 F.2d, at 765 n.6. Thus, petitioners' status as at-will or not-at-will employees stood as the threshold test for both of their alternative tort claims.[5] As the Ninth Circuit consequently held, unless petitioners overcame the at-will presumption, neither their bad faith discharge nor intentional infliction claims could stand:

> Because plaintiffs were employed at will, Hilton was entitled to discharge them at will. They cannot maintain a cause of action under Nevada law for . . . bad faith discharge. . . .
>
> [For the same reason] their discharge did not amount to the type of willful misconduct that could serve as a predicate for the tort of intentional infliction of emotional distress. *See Alford v. Harold's Club*, 669 P.2d 721 (Nev. 1983) (upholding dismissal of plaintiffs' claims for intentional infliction of emotional distress arising from their terminations for refusal to comply with a tip pooling policy, because the tip pooling policy was legal and hence their terminations could not be wrongful).

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[5] Even if petitioners could overcome the threshold test of proving their employment was not-at-will, moreover, it is by no means clear that Nevada will allow a not-at-will employee to pursue tort as distinct from contract damages for a termination that stops short of violating declared public policy which, under *Wiltsie* v. *Baby Grand Corp., supra*, petitioners are not in a position to prove. *Compre K Mart Corp.* v. *Ponsock, supra, with Marcoz* v. *Summa Corp.*, 801 P.2d 1346 (Nev. 1990) (viability of bad faith discharge claim by not-at-will employee uncertain where ERISA preemption is raised to preclude special reliance on pension benefits). *Cf. Falline* v. *GNLV Corp.*, 828 P.2d 888, 894 (Nev. 1991) (declining to recognize intentional infliction claim in context of improper denial of workers' compensation benefits because doing so "raises the spectre of almost every emotion-based case turning up as some kind of tort suit") (citation omitted).

Pet. App., at 21, 959 F.2d, at 765-66 (citations omitted). There is no disagreement between the majority and the dissent on this point. *See* Pet. App., at 46-47, 959 F.2d, at 777 ("[b]ecause [I believe] the jury properly decided the terminations were wrongful, I would not find, as the majority does, that the district court erred in instructing the jury on . . . intentional infliction of emotional distress") (Boochever, J., dissenting).

The key to the Ninth Circuit's decision is the at-will presumption and whether, as a matter of Nevada law, petitioners overcame it.[6] The majority held that they did not. The dissent would hold that they did. Petitioners obfuscate this crucial point by discussing their intentional infliction claims as if they existed separate and apart from their contract claims when in fact the latter remain in the case only as an element of the former.

The petition also misrepresents a number of stated facts. A prime example is the statement on page 3 of the petition

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[6] Here, as in the Ninth Circuit, petitioners argue Hilton did more than just terminate them. The additional "acts" claimed to give rise to tort liability consist of (1) Hilton's refusal to explain the terminations except as a "change of personnel"; (2) the company's statement to the press, when asked, that cheating was not involved; and (3) its testimony about the low PC after being haled into court and required to explain its reasons for the terminations. No member of the panel, including Judge Boochever, credited these fall-back arguments. The Nevada Supreme Court has authorized casinos to refuse to explain employee terminations except in general terms whether or not, and perhaps especially when, widespread cheating is suspected. *Moen* v. *Las Vegas Int'l Hotel, Inc.*, 521 P.2d 370, 371 (Nev. 1974). Hilton's statements in response to questions from the press and in court are privileged and not actionable in tort, whether as intentional infliction or under some other label. *The Florida Star* v. *B.J.F.*, 491 U.S. 524, 540-41 (1989); *Knox* v. *Dick*, 665 P.2d 267 (Nev. 1983). Petitioners effectively conceded below at least the second and third points. *See* Opening Brief of Brooks, *et. al.*, in the Ninth Circuit (hereafter "Petrs. Op. Br."), at 33 ("plaintiffs' [intentional infliction] claim is not based upon the casino manager's statement to a newspaper after plaintiffs' terminations to the effect that plaintiffs' honesty and integrity were unquestioned. Nor is it premised upon the [casino manager's] sworn testimony . . . during and at trial that plaintiffs could have been involved in cheating.")

that "[t]he jury . . . found that Hilton's management had used the dismissals as a cover-up for an embezzlement scam by management that was costing Hilton millions of dollars." Petitioners argued this theory, among others, but nowhere in the 177 separate verdict forms and special interrogatories was such a finding made and, indeed, the evidence of record was to the contrary.[7]

Petitioners sought rehearing and rehearing *en banc* in the Ninth Circuit. Thirty-six days after their petition was filed, it was denied, with no active judge voting to hear the case *en banc*.

II. NONE OF THE FOUR QUESTIONS PRESENTED MERITS REVIEW BY THIS COURT

A. There Is No Dispositive Issue of State Law That the Ninth Circuit Failed To Answer or Should Have Certified

Question 1 is premised on the erroneous assertion that, in deciding this case, the Ninth Circuit was required but refused to decide whether the Nevada Supreme Court

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[7] Petitioners give no record cites—nor could they—to the jury's "finding" of a management fill scam. The citations they gave below to support their "management fill scam" theory were to *stricken* testimony and "expert" testimony later shown to be based on incomplete facts and a statistical approach even petitioners' statistician said was flawed. *See* Petrs. Op. Br., at 7 n.6 (citing RT X 157-68, which testimony the District Court struck as impermissibly speculative, RT XI(A) 78-79, and RT XV 75-76, 87, 113-16, which opinion testimony was discredited as statistically faulty, RT XXII 13-15 and XL 118, and based upon incomplete facts, *compare* RT XVI 62-64 (absence of evidence of Hilton's adoption of certain measures carried significant weight with petitioners expert) *with* RT XLT 150-51 (the measures were undertaken, petitioners simply did not ask Hilton or tell their expert about them, *see* RT XVI 64-65 and 102)).

Other misrepresentations include but are not limited to petitioners' attribution to Barron Hilton of an "undisputed admission," *see* note 3, *supra*, and the federalism concerns they try to raise, Pet., at 4-5. Neither the record nor the facts support petitioners' unstated but apparent claim that the Nevada legislature and/or Nevada Supreme Court has passed on, much less validated, the trial court's judgment in this case.

would recognize the tort of intentional infliction of emotional distress in the not-at-will employment termination context. Because the Ninth Circuit concluded that petitioners were employed at will, it was not required to discuss, let alone resolve, that open issue of Nevada law. Therefore, the question presented by petitioners is hypothetical—constituting an attack on *dictum*—and would not warrant review even if other federal courts of appeals differed from the majority in their approach to resolving similar undecided issues of state law—which they do not,[8] and even if petitioners were otherwise entitled to the relief they actually seek from this Court, certification—which they are not.

1. Question 1 Is Hypothetical

As discussed above, all three members of the panel interpreted Nevada law to preclude an action for intentional infliction of emotional distress where the discharged employee was an at-will employee. The majority and dissent also agreed that the Nevada courts, in the dissent's words, "have not addressed the issue of whether a cause of action for intentional infliction of emotional distress exists in the [wrongful] employment termination context." Pet. App., at 47, 959 F.2d, at 777 (Boochever, J., dissenting). As the majority observed, the Nevada Supreme Court only recently declined to address that question. Pet. App., at 22, 959 F.2d, at 766 (citing *D'Angelo* v. *Gardner*, 819 P.2d 206, 211, 219 n.13 (Nev. 1991)).

The difference between the majority and dissent arises from their contrary answers to the question whether petitioners were, as a matter of Nevada law, at-will employees. By answering that question in the affirmative, the majority was not required, in disposing of the case, to determine the status of Nevada law respecting intentional infliction in the not-at-will context. The majority itself ex-

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[8] As discussed in note 11, *infra*, two other federal courts of appeals faced with similar claims by diversity plaintiffs have refused to extend the applicable State's law to recognize intentional infliction claims in the employment termination context.

pressly recognized that its discussion of the intentional infliction issue in the not-at-will context was unnecessary, prefacing that discussion with the statement, "[e]ven had [petitioners] managed to establish that the terminations were wrongful . . . ." Pet. App., at 22, 959 F.2d, at 766. That part of the Ninth Circuit's *opinion* challenged in Question 1 is thus hypothetical *dictum*. This Court does not sit to review abstract, hypothetical questions whose resolution would be irrelevant to the ultimate disposition of the case. *See Sommerville* v. *United States*, 376 U.S. 909 (1964), as discussed in R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 201 (6th ed. 1986).

Petitioners deliberately elide the critical distinction between at-will and not-at-will employees because, in order to avoid the hypothetical nature of their primary question, they would have to persuade the Court to grant review of the at-will issue. But this Court would have no reason to expend its resources to review the 71-volume transcript of a 55-day trial for the sole purpose of second-guessing the determination by a court of appeals of an intensely fact-bound issue of state law, in this case whether the evidence was sufficient to overcome the presumption of at-will employment and to send the at-will issue to the jury.

Petitioners themselves state that this Court "does not ordinarily grant certiorari to correct errors of state law," Pet., at 16. Petitioners' acknowledgment that this Court would not "ordinarily" undertake such a task is considerably understated. As the Court has on numerous occasions made clear, the Court defers to interpretations of state law by the lower federal courts. *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985). One reason for the Court's deference is to conserve its own resources; thus, it defers in order to "render unnecessary [its] review" of such state law issues. *Cort* v. *Ash*, 422 U.S. 66, 73 n.6 (1975). This prudential rule is grounded in part in the reality that because this Court (and the lower federal courts) is not the final expositor of the substantive content of the law of any State, its decision on a point of state

law would have no significant impact beyond the litigants before it.

This case resulted in briefs filed in the Ninth Circuit totalling more than 440 pages. It was argued to the panel for almost two hours. Some eight months after oral argument of this case, the panel invited the parties to submit supplemental briefs addressing whether, under the then-recent decision of the Nevada Supreme Court in *D'Angelo* v. *Gardner*, *supra*, petitioners should be presumed to be at-will employees and whether the case properly went to the jury on that question. The majority opinion exhibits a careful and extensive consideration of the briefs and the record. It is difficult to comprehend why this Court would expend its scarce resources and, sitting as a court of error, reexamine the majority's conclusion on the at-will issue. Thus, petitioners' request that the Court grant certiorari to review Question 1 suffers from a fatal flaw because that question, standing alone, is abstract and hypothetical.

2. Question 1 Would Not Warrant Review Even If It Were Not Derived from *Dictum*

Question 1 is also fatally flawed in other respects. Under one reading of the petition, petitioners appear to seek the adoption by this Court of a rule that federal courts confronted with a request to take state law into uncharted waters are, in the dissenting judge's term,[9] "free" to *create*, by the stroke of the federal judicial pen, important state policy. In this case, that policy would, if enacted by the federal courts, substantially affect the fundamental relationships between employers and employees in Nevada.

The majority canvassed the state of the law in Nevada and other jurisdictions, correctly concluded that Nevada law does not currently recognize a right of action for in-

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[9] Pet. App., at 47, 959 F.2d, at 777. The case relied upon by the dissent, *Paul* v. *Watchtower Bible & Tract Society*, 819 F.2d 875 (9th Cir.), *cert. denied*, 484 U.S. 926 (1987), is not even cited by petitioners in support of their appeal to principles of federalism, nor should it have been since the portion of the Paul opinion cited is pure *dictum*.

tentional infliction in the employment termination context, and declined to declare that such a right of action existed as a matter of Nevada law. The majority below did not, however—as suggested by petitioners, Pet., at 6 (the majority adopted "a new doctrine of judgment by default")—deny that it had the *authority* to take the extraordinary step of creating such a right of action. Rather, the majority stated, in addressing this issue as *dictum*, that it would not take unto itself the task of creating such significant Nevada policy *because* it had no guidance from the Nevada Supreme Court[10] and *because* the wisdom of adopting such a policy was "open elsewhere."[11]

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[10] Petitioners, Pet., at 7, cite two Nevada federal cases as recognizing an action for intentional infliction and complain that the court below "considered none of these district court judgments." In fact, neither the majority nor the dissent cited either of those two cases, *Wolber* v. *Service Corp. Int'l*, 612 F. Supp. 235 (D. Nev. 1985) and *Norman* v. *General Motors Corp.*, 1 IER Cases, 1221, 1222 (D. Nev. 1986), because neither case supports petitioners' position. The doctrinal basis for *Wolber* was repudiated in *Sands Regent* v. *Valgardson*, 777 P.2d, at 899-900, while *Norman*'s "abuse of power" rationale was expressly rejected by the District Court in this case, Pet. App., at 53, and that case is otherwise factually distinguishable.

[11] The majority, Pet. App., at 22 n.8, 959 F.2d, at 766 n.8, cited *Lanouette* v. *Ciba-Geigy Corp.*, 272 Cal. Rptr. 428 (Ct. App. 1990), for that proposition, a case that had been relied upon by petitioners in their principal brief in the Ninth Circuit. At that time, *Lanouette* was *sub judice* in the California Supreme Court, which on July 9, 1992 transferred *Lanouette* to the Court of Appeal, 2 Cal. 4th No. 21, at 2 (Dispositions) (1992), for reconsideration in light of its May 18, 1992 decision in *Livitsanos* v. *Superior Court*, 828 P.2d 808 (Cal. 1992). *Livitsanos* held that no cause of action for intentional infliction in the employment context existed in California because preempted by California's workers' compensation statute. In so holding, that court expressly recognized that because the workers' compensation statute did not itself provide for compensation for emotional distress in some circumstances, some employees would have no remedy at all for emotional distress: "Not every aggravation in normal employment life is compensable." *Id.*, at 816. *Livitsanos* casts considerable doubt on petitioners' reliance, Pet., at 7 n.1, on other prior California appellate decisions as establishing in California a common law right of action for intentional infliction in the employment termination context. Other cases relied on by petitioners in that same footnote are equally suspect as support for

It is evident, therefore, that the most the majority's opinion can be read for is that the majority applied existing Nevada law, but declined to exercise gratuitously whatever discretion it might have to create important Nevada policy.[12] To be sure, petitioners disagree with the Ninth Cir-

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the proposition for which they are cited. *See, e.g., Patton* v. *J.C. Penney Co.*, 719 P.2d 854, 858 (Or. 1986) (explaining that court's prior decision in *Hall* v. *May Department Stores Co.*, 637 P.2d 126, 131 (Or. 1981)—cited in petitioners' footnote 2—as involving "deliberate[] use [of] psychic distress in an attempt to coerce an employer into admitting a crime").

As other federal courts have recognized, a right at common law for employees to sue for intentional infliction of emotional distress in the employment termination context does not exist in a number of jurisdictions. *See Beck* v. *Interstate Brands Corp.*, 953 F.2d 1275, 1276 (11th Cir. 1992) (per curiam) (Georgia); *Cox* v. *Keystone Carbon Co.*, 861 F.2d 390, 395 (3d Cir. 1988) (Pennsylvania), *cert. denied*, 111 S. Ct. 47 (1990); *London* v. *Hayek*, 756 F. Supp. 107, 109 (S.D.N.Y. 1989) (South Carolina); *Fletcher* v. *Wesley Medical Center*, 585 F. Supp. 1260, 1262 (D. Kan. 1984) (Kansas). These federal cases illustrate a reluctance among the federal courts of appeals (and district courts) to create or extend state law in this sensitive area. None of those courts thought it useful to certify the matter to the pertinent state courts (only Pennsylvania has no certification procedure).

[12] Petitioners claim that the refusal of the court of appeals to *make* important Nevada policy constitutes "inaction" in violation of the Court's decisions in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), and *Salve Regina College* v. *Russell*, 111 S. Ct. 1217 (1991). As for *Erie*, it is absurd to suggest that a case that withdrew from the federal courts the authority to displace substantive state policy through the adoption of conflicting "general" law or federal common law can be read as petitioners do. In addition, this Court does not exercise its discretionary jurisdiction to police adherence by the federal courts of appeals to *Erie*. *See Haring* v. *Prosise*, 462 U.S. 306, 314 n.8 (1983). As for *Salve Regina*, it suffices to point out that petitioners' reliance, Pet., at 8 & n.2, on the District Court's opinion declining to dismiss pre-trial their intentional infliction claim confirms the wisdom of *Salve Regina*'s holding that determinations of state law are to be reviewed *de novo* by the federal courts of appeals. As a cursory review of the District Court's opinion, Pet. App., at 54, reveals, the District Court left the intentional infliction claim in this case without citing so much as a single decision rendered at any level of Nevada's state court system. Our federalism respects the right of the citizens of each State to place in the hands of state judges the authority to make important social policy under the guise of the common law. Our federalism does not, however, require

cuit's refusal to create new Nevada law, but the Ninth Circuit's exercise of discretion not to create new Nevada law surely presents no important issue of federal law. Petitioners are, at bottom, asking this Court on the merits to predict that the Nevada Supreme Court would recognize such a right of action on the basis of nothing more than that several other States have arguably, *but see* note 11, *supra*, recognized such a right of action. It is not, however, the role of this Court to second-guess such predictions by the courts of appeals that affect only the rights and obligations of the litigants before them.[13]

Shrinking from the evident and far-reaching implications of the notion that federal courts are "free" to create important state policy out of whole cloth, the dissenting judge below concluded, *sua sponte*, that "the preferable alternative" would be to certify this policy issue to the Nevada Supreme Court. Pet. App., at 47, 959 F.2d, at 777. Petitioners, for their part, conclude their discussion of Question 1 with the plea that, "[m]inimally, this Court should vacate the judgment below with instructions . . . [to] certify the issues of state law to the Nevada Supreme Court." Pet., at 9.

Petitioners do not appear to seek adoption of a rule under which federal courts would be *required* to certify issues of state law under the circumstances of this case. Any such rule would have no basis in law and would be contrary to this Court's emphasis on the discretionary na-

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federal judges to engage in such a lawmaking function when plaintiffs voluntarily seek relief in federal courts on novel state law claims.

[13] Nor is Question 1 "important" for purposes of the Court's exercise of its certiorari jurisdiction. The concept of importance does not include the importance of resolution of a question to just the litigants before the Court. *See, e.g., Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 79 (1955). Petitioners point to no other federal litigants in the Ninth Circuit who might be adversely affected by this decision. Thus, this case presents no questions of importance to anyone but petitioners, who have already collected more than $3 million from Hilton on their federal statutory claims and stand to collect another $1.4 million on their ADEA claims upon denial of this petition.

ture of the certification authority. *See, e.g., Lehman Brothers* v. *Schein*, 416 U.S. 386, 391 (1974) (the use of certification "in a given case rests in the sound discretion of the federal court"). Thus, it appears that petitioners in actuality urge the Court to grant review of Question 1 to do nothing more than enter an order directing certification by the Ninth Circuit of what petitioners vaguely describe as "the issues of state law." Such an action would not only be an unprecedented exercise of this Court's certiorari jurisdiction but would be, as discussed next, totally inappropriate on the merits.

3. Certification of Any State Law Issues Would Be Totally Inappropriate

As discussed above, the question whether the Nevada Supreme Court would recognize the intentional infliction tort in the not-at-will employment termination context is, in this case, hypothetical. Thus, any rational certification would either have to be preceded by a redetermination of the at-will issue (reversing the Ninth Circuit's determination) or would have to be expanded to include the at-will issue. If precedent exists for such a bizarre certification, Hilton has not been able to find it; indeed, the precedent is to the contrary.[14] Petitioners' limited request, if expanded to include the at-will issue, would be little else than a request to transfer a considerable portion of a case they have now lost to the Nevada state court system even though they voluntarily brought their highly speculative

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[14] As observed in part I. above, there is an abundance of Nevada law on the at-will presumption, all made by the Nevada Supreme Court (Nevada has no intermediate appellate court). "Where the applicable state law is clear, certification is inappropriate; [certification] is not a procedure by which federal courts may abdicate their responsibility to decide a legal issue when the relevant sources of state law . . . provide a discernible path . . . ." *Tidler* v. *Eli Lilly and Co.*, 851 F.2d 418, 426 (D.C. Cir. 1988). Thus, the only at-will issue remaining for possible certification would be the *application* of discernible Nevada law to the voluminous record in this case. Petitioners do not request certification of that issue in the petition.

intentional infliction claims in federal court when they could have brought those claims in state court.[15]

Petitioners' post-eleventh-hour plea for certification suffers from other fundamental defects. Petitioners disingenuously represent to the Court that they "requested certification in the[ir] Petition for Rehearing." Pet., at 9 n.3. They do not, however, disclose to the Court that that request at the rehearing stage represented a complete reversal of the position they expressly took on certification in the Ninth Circuit before that court ruled against them. In their principal brief in the Ninth Circuit, the pertinent pages of which are reprinted in the Appendix hereto, petitioners affirmatively opposed certification of *any* issue in this case.[16]

In the Ninth Circuit, the black-letter law is that "particularly compelling reasons" must be present where certification is sought for the first time on appeal "by a movant who lost on the issue below." As the Ninth Circuit put the matter, "[o]rdinarily such a movant should not be allowed a second chance at victory." *In re McLinn*, 744

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[15] The federal courts of appeals are in general agreement "that one who chooses the federal courts in diversity actions is in a particularly poor position to seek certification." *Cantwell* v. *University of Massachusetts*, 551 F.2d 879, 880 (1st Cir. 1977). *See, e.g., Seaboard Surety Co.* v. *Garrison, Webb & Stanaland, P.A.*, 823 F.2d 434, 438 (11th Cir. 1987); *Colonial Park Country Club* v. *Joan of Arc*, 746 F.2d 1425, 1429 (10th Cir. 1984); *Smith* v. *FCX, Inc.*, 744 F.2d 1378, 1379 (4th Cir. 1984), *cert. denied*, 471 U.S. 1103 (1985).

[16] In their opening brief in the Ninth Circuit, at pp. 42-43 & n.61, reprinted *infra*, App., at 2a, petitioners opposed certification of the question whether a Nevada statute not at issue in this Court preempted their intentional infliction claim, stating that the District Court "had substantial relevant authority, from Nevada and elsewhere, to rely upon for guidance" in deciding that question. In footnote 61 appended to the foregoing quote, petitioners asserted, emphasis added, that "[t]he same is true" with regard to their intentional infliction claims. Petitioners then concluded in the text of their brief that "certification of this [the statutory preemption issue] *or any other issue* is unwarranted."

F.2d 677, 681 (9th Cir. 1984). *See also Louie* v. *United States*, 776 F.2d 819 (9th Cir. 1985).

Petitioners concluded that they were going to prevail in the Ninth Circuit and they were wrong. The refusal of a single Ninth Circuit judge to respond to their certification plea in their suggestion for rehearing *en banc* is consistent with the reception that plea had to receive under *McLinn* and would have received in other courts of appeals. *Cf. Fischer* v. *Bar Harbor Banking and Trust Co.*, 857 F.2d 4, 7 (1st Cir. 1988) (certification "particularly inappropriate" where plaintiff sought certification for the first time on appeal and plaintiff voluntarily chose to bring state law claims in federal court), *cert. denied*, 489 U.S. 1018 (1989). As the Eighth Circuit put the matter in *Perkins* v. *Clark Equipment Co.*, 823 F.2d 207, 210 (8th Cir. 1987), "[t]he practice of requesting certification after an adverse judgment has been entered should be discouraged. Otherwise, the initial federal decision will be nothing but a gamble with certification sought only after an adverse decision." *Accord Chrysler Credit Corp.* v. *Louis Joliet Bank & Trust Co.*, 863 F.2d 534, 540-41 (7th Cir. 1988); *Armijo* v. *Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988).

A fortiori these rules should apply where, as here, certification is sought not simply for the first time on appeal, but on rehearing in the court of appeals and, thence, in this Court, by a litigant who previously opposed certification. There is certainly no warrant for this Court to exercise its discretionary jurisdiction to facilitate such gambling by litigants. Indeed, were this Court ever to do so, it would predictably be flooded with petitions from disappointed litigants who had rolled the dice in the courts of appeals and lost.[17]

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[17] Because the only issue petitioners sought to have certified on rehearing was the hypothetical question whether Nevada would recognize the intentional infliction tort in the not-at-will context, their plea in this Court for certification of what they characterize as "the issues of state law" comes doubly late as to any issue on which certification was not sought below.

Even if petitioners had sought (rather than opposed) certification before they lost below, moreover, it is doubtful whether the vaguely articulated "issues" upon which they now seek certification would have been suitable for certification. Certification is inappropriate where "the issue sought to be certified is only one of many involved in the litigation." *In re McLinn*, 744 F.2d, at 681. Indeed, under Nevada's certification rule, the question certified must be "determinative" of the case. Rule 5, Nev. R. App. P. In this case, the barriers to petitioners' recovery of any tort damages on their state law claims are multiple and formidable and certification of the sole question posed by petitioners on rehearing below and in the petition would not be "determinative" of anything.[18]

Based on the foregoing facts and decisions, it is evident that petitioners' assertion, Pet., at 9, that the refusal of the Ninth Circuit on rehearing to overlook petitioners' reversal of position on certification and accept their belated invitation to certify a hypothetical question constituted an "abuse of discretion" is baseless even if this Court ex-

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[18] Because of the way the majority resolved the at-will issue, it did not "discuss the [other state law,] federal and constitutional issues raised by Hilton in its appeal." Pet. App., at 6, 959 F.2d, at 759. Those issues include, *inter alia*, Hilton's challenge, on ERISA preemption grounds, *see Ingersoll-Rand Corp.* v. *McClendon*, 111 S. Ct. 478 (1990), to the trial judge's submission of the state law claims to the jury; its challenge, on federal due process grounds, to the retroactive imposition of at least $30 million in punishment for acts lawful when undertaken; its challenge to petitioners' proof of the other elements of the bad faith discharge and intentional infliction torts, especially the existence of a required "special relationship" between Hilton and its employees in a non-ERISA setting, *see* note 5, *supra;* whether, under *D'Angelo*, 819 P.2d, at 209 n.4, the disclaimers contained in Hilton's ERISA plan and other handbooks precluded petitioners' claim to not-at-will status as a matter of law; and whether the group proof of liability and damages violated Nevada law and the Seventh Amendment. Each of these issues (and others) would have to be addressed and resolved adversely to Hilton before the judgment of the court of appeals would be affected by the certification sought by petitioners even if the Nevada Supreme Court hypothetically recognized on certification the right of action asserted by petitioners.

pended its resources to supervise the exercise of that highly discretionary authority by the courts of appeals—which it does not. Indeed, had the Ninth Circuit ordered certification of that hypothetical question at petitioners' request at the rehearing stage, its decision to do would have been contrary to Ninth Circuit cases such as *McLinn* and itself an abuse of discretion. Question 1 does not warrant review.

B. Questions 2 and 3 Involve Issues of Evidentiary Sufficiency and Pure State Law That Do not Warrant the Exercise of Certiorari Jurisdiction

As discussed in part II.A.1. above, this Court does not expend its resources in second-guessing decisions of the courts of appeals that turn on the resolution of questions of state law, including the question of the sufficiency of the evidence to send an issue of state law to the jury. Petitioners, in order to circumvent the Court's practice in this regard, dress what is at bottom nothing more than a sufficiency-of-the-evidence claim in Seventh Amendment and *Erie* clothing. Such dress, however, does not convert their claim into one meriting this Court's review.

1. The Majority's Determination That Petitioners Failed To Present Evidence of a Type the Nevada Supreme Court Would Hold Sufficient To Rebut the Presumption Their Employment Was At Will Is Correct and Unexceptionable

Absent a "very obvious and exceptional show of error," *Graver Manufacturing Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949), "a question whether the evidence was sufficient to support the jury verdict for the plaintiff stands little or no chance of being granted," *Supreme Court Practice, supra,* at 220. A contrary rule would serve "not only to disregard the Court's proper function, but to deflect the Court's energies from the mass of important and difficult business properly here." *Sentilles* v. *Inter-Caribbean Corp.*, 361 U.S. 107, 111 (1959) (Stewart, J., concurring). Petitioners, Pet., at 13, rely solely on *Schultz* v. *Pennsylvania R.R. Co.*, 350 U.S. 523 (1956), to support their

"jury infringement" argument, but *Schultz* itself is a pre-1969 Jones Act case which raised a sufficiency-of-the-evidence claim that the Court no longer accepts for review. *Supreme Court Practice, supra,* at 219-20.

Petitioners' jury infringement argument rests on a philosophical disagreement with having a court, rather than a jury, decide whether the elements of their contract and tort claims were sufficiently made out to go to the jury. But it is the duty of courts, utilizing procedures such as summary judgment, directed verdict and judgment notwithstanding the verdict, to separate legally sufficient and legitimate claims from illegitimate claims that, whatever their emotional appeal, are not allowed in law. Hyperbole aside, the Ninth Circuit's review and reversal of the judgment on petitioners' state law claims not only was constitutionally regular, but was procedurally routine. *See, e.g., Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 298 (1967) (court of appeals properly reversed denial of judgment notwithstanding the verdict where essential elements of plaintiff's tort claims were not proved; granting judgment notwithstanding the verdict does not violate the constitutional guaranty of a jury trial).

In their attempt to convert their sufficiency-of-the-evidence claim into a "jury infringement" issue that would, even if the conversion could be made, not warrant this Court's review, petitioners identify two categories of evidence they say the majority misconstrued or overlooked: (1) evidence of Hilton's "post termination" conduct in "deliberately convey[ing] the message, from about 1984 until the jury verdict in 1989, that petitioners were responsible for huge losses—all the time knowing that the problems at the Hilton operations had nothing to do with petitioners," Pet., at 11; and (2) evidence relating to petitioners' express and implied contract claims, *id.*, at 12. Neither category supports their cause, much less their plea for this Court to second-guess the court below.[19]

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[19] Petitioners also complain that the majority, in reviewing the record,

Petitioners posit the so-called post-termination evidence as sufficient, "by itself," to support judgment on their intentional infliction claims. Pet., at 11. Petitioners' position contradicts their admission below—that they did *not* base their intentional infliction claims on Hilton's statement to the press or its compelled testimony in deposition and at trial about the low PC—which comprised the only evidence of post-termination "acts" by Hilton that petitioners were able to present. *See* note 6, *supra*. It is, moreover, established in Nevada (as in most States) that claims for intentional infliction of emotional distress cannot be predicated on an employer's statements, in an administrative or judicial hearing on a contested termination, about the reasons for the firing. *Id.*; *see Knox* v. *Dick*, 665 P.2d 267 (Nev. 1983). Under these circumstances, it would have been error to consider the post-termination evidence, not the reverse.

Respecting their implied contract claims, petitioners recite a laundry list of the items of evidence they say the majority "ignored or rejected," thereby invading "the fact-finding function of the jury." Pet., at 12-13. Items (1), (3), (4), (7) and (8) of petitioners' eight-item list correspond almost exactly to items (1), (3), (4), (4) and (2), respectively, as articulated by the majority in its summary of petitioners' proof of an implied contract, reprinted *supra*, at 3, Pet. App., at 6-7, 959 F.2d, at 759-60. While not set out by the majority in list form, the other items on petitioners' laundry list—items (2), (5) and (6)—were specifically addressed by the majority as well. Pet. App., at 8 n.1, 14-15 & 18-19, 959 F.2d, at 960 n.1, 963 & 964 n.5. None of the items in petitioners' laundry list thus can be said to have been "ignored" or "rejected" by the majority.

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displayed a "casual attitude toward the petitioners as individuals . . . ." Pet., at 10. Even if petitioners' complaint had some legal or factual basis—which it does not, petitioners fail to acknowledge that, at their insistence, the "jury was charged to consider the [implied] contract [of employment] issue as to the plaintiffs collectively." Pet. App., at 18, 959 F.2d, at 764. Petitioners thus chose at trial to stand or fall together, a choice they were not free to repudiate in the Ninth Circuit, nor in this Court.

The majority did, however, reject *as legally insufficient* to overcome the at-will presumption the *types* of evidence identified in petitioners' laundry list. Its decision comports fully with the Nevada cases cited in part I. above and with the Ninth Circuit's kindred decision in *Smoot* v. *Boise Cascade Corp.*, 942 F.2d 1408 (9th Cir. 1992), as the majority's meticulous comparison of the facts presented here and in those authorities shows. Petitioners' true disagreement is not with the majority's depiction of the record facts—which is demonstrably faithful to the evidence—but with its refusal to imbue those facts with the legal significance petitioners see in them. This is not a question of fact, for the jury to decide, but one of state law, for the court of appeals.[20] Question 2 is not worthy of this Court's review.

2. There Is No Legitimate *Erie* Issue in the Ninth Circuit's Interpretation and Application of Nevada Law

Question 3 assails what petitioners describe as "the Court of Appeals [sic] misconstrual of state law." Pet., at 16. Petitioners mount two separate attacks, one on the intentional infliction claims, the other on the at-will presumption. First, they contend the court below erred in treating their at-will status as a disqualifying precondition instead of a surmountable defense to their intentional infliction claims. Pet., at 14. Second, they say the Ninth Circuit "confused" Nevada law governing implied contracts of continued employment by analyzing the claimed contracts according to the individual factors asserted to give rise to them instead of treating the factors collectively. Pet., at 15-16. What the majority has done, petitioners

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[20] *Compare* Fed. R. Evid. 302 ("the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law") *with* 9 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2254 p. 541 (West 1971) ("[w]hether the evidence is sufficient to create an issue of fact for the jury is solely a question of law to be determined by the court") (footnote omitted) and cases discussed in part II.A.1., *supra* (this Court defers to the courts of appeals in matters of state law).

inveigh, is to "put [Hilton's] outrageous abuse of its relationship with petitioners beyond the reach of law . . . [with] absolutely no indication in state decisions that such conduct is to be protected." Pet., at 16.

It is petitioners who are confused. Hilton's post-termination conduct has no proper place in petitioners' intentional infliction claims by reason, first, of petitioners' explicit concession on that point and, second, as a matter of state and First Amendment law. *See* note 6, *supra*. This leaves the terminations themselves as the "act" claimed to give rise to liability in tort. The majority's decision that the act of terminating an at-will employee does not constitute a tort conforms to Nevada law under *Alford* v. *Harold's Club*.[21]

Nor did the majority depart from or otherwise misinterpret the law applicable to petitioners' at-will status. As the majority opinion demonstrates—and petitioners largely conceded below—the Nevada Supreme Court's decisions in *Bally's Grand*, *Vancheri*, *Valgardson* and *Śmith v. Cladianos*, "hold that any one of [the items comprising petitioners' laundry list of at will evidence] alone . . . is insufficient to defeat the at will presumption, and that vague, general statements of good will [are] insufficient to give rise to enforceable contract rights." Petrs. Op. Br., at 18. Petitioners nonetheless present to the Court as collectively sufficient the very factors they conceded

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[21] Petitioners, without the support of Judge Boochever in dissent, try to circumvent the holding of *Alford* by suggesting, Pet., at 14, that the Nevada Supreme Court in *Alford* misunderstood and misapplied "a line of authorities," including Restatement 2d Torts and two of its own decisions, upon which *Alford* assertedly "was itself based." Aside from the fact that the *Alford* decision makes no reference whatsoever to those "lines of authorities," petitioners, who purport to be the champions of federalism, argue in effect that in *Alford*, which squarely held that the intentional infliction tort would not lie absent an independent legal wrong, the Nevada Supreme Court got the law wrong. In so twisting principles of federalism (as they do throughout the petition) to suit their ends, petitioners do not tell the Court that *no* State recognizes a common law right of an at-will employee to recover for intentional infliction of emotional distress arising out of a discharge.

below were individually insufficient under Nevada law to overcome the at-will presumption, Pet., at 15.

The factors petitioners contend to be collectively sufficient bear on their *implied* and not their *express* contract claims. *See* Pet., at 12-13. The Nevada cases they cite to support their claim that the contract issue "is one of fact to be determined by the jury on the basis of *all* of the evidence," Pet., at 15 (emphasis in original), however, are all *express* contract cases.[22] It is one thing to state that evidence of specific oral promises made at the time an express contract was allegedly formed should be considered, and quite another to conclude that an enforceable "implied" contract can inhere in conduct already held, as a matter of law, to be without promissory content or legal significance.

As the majority correctly held, an implied

> contract is, after all, a legal relationship which requires a meeting of the minds between the contracting parties. Individual factors that do not, as a matter of law, establish such a meeting of the minds cannot, by some peculiar alchemy, create a legally binding relationship when combined with each other.

Pet. App., at 9 n.3, 959 F.2d, at 761 n.3. This ruling is unexceptionable. It states as law the results reached in *Vancheri*, *Valgardson*, and *Bally's Grand*, where the Ne-

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[22] In *Stone* v. *Mission Bay Mortgage Co.*, 672 P.2d, at 629, on which petitioners principally rely, the case was remanded for trial based on the employee's sworn statement that she and her employer entered into an *express* "oral contract of employment for 'no less than one year' . . . prior to her beginning work . . . she [understood] would only be terminated if her work was found to be unsatisfactory." The employee in *Beales* v. *Hillhaven, Inc.*, 825 P.2d, at 216, testified she was "hired, pursuant to a [written] employee handbook" that, unlike the Hilton handbooks here, *expressly* stated, 'the days of termination 'at will' or 'at whim' are gone.' " The employees in *D'Angelo* likewise presented evidence of express contractual promises, not simply conduct from which they sought to have such promises implied.

vada Supreme Court rejected multiple items claimed to prove an implied contract as individually *and collectively* insufficient to overcome the at-will presumption. It also is in harmony with Nevada's traditional implied contract law generally.[23]

The Ninth Circuit, in short, correctly determined and applied state law.[24] But there is another, even more fundamental reason to reject Question 3 as a basis for the exercise of certiorari jurisdiction in this case. As previously noted, the "Court does not . . . grant certiorari to correct errors of state law." Pet., at 16. Indeed, in 1980 the Court specifically modified what is now its Rule 10 governing exercise of its certiorari jurisdiction to eliminate cases in which a federal court of appeals was said to have resolved "an important state [law] . . . question in a way in conflict with applicable state . . . law." *See Supreme Court Practice*, *supra*, at 194-95. The task of deciphering, predicting, and applying state law belongs to the courts of appeals and the district courts, not this Court. As exemplified by

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[23] *See Warrington*, 590 P.2d, at 1164 ("while custom and usage may be used to establish the terms of a contract, it cannot create one where none existed"; nor can a promise be implied from an informal act of courtesy without recognized promissory significance); *Smith* v. *Recrion Corp.*, 541 P.2d, at 665 (an implied contract, equally with an express contract, requires an "ascertainable agreement," conduct or words expressive of the terms of the contract and an intent to be legally bound).

[24] Nor is there any merit to petitioners' alternative argument that, even if the majority correctly analyzed the law applicable to their initial agreement with Hilton, it disregarded the later modification that agreement under went. Pet., at 12. The evidence petitioners presented consisted almost entirely of corporate "pep talks" following times of turmoil, such as the weeks following the Las Vegas Hilton fire in which eight people lost their lives. Such vague statements do not, as a matter of law, convert at-will contracts to contracts terminable only for just cause, *Smoot* v. *Boise Cascade Corp.*, *supra*; they are insufficiently definite. Indeed, so easy is it to allege a subsequent modification of a contract whose performance is already underway that Nevada requires proof of the fact and terms of such a modification to be by clear and convincing evidence, *Clark County Sports Enterprises, Inc.* v. *Las Vegas*, 606 P.2d 171 (Nev. 1980), a standard not even petitioners contend was satisfied here.

the 1980 amendments to Rule 10, this Court has a "settled and firm policy of deferring to regional courts of appeals in matters that involve construction of state law." *Bowen* v. *Massachusetts*, 487 U.S. 879, 908 (1988). No cause exists to depart from that firm practice here.

C. Petitioners' Untimely Challenge to Judge Kozinski's Qualifications Is Frivolous

Petitioners filed their motion to recuse Judge Kozinski on June 1, 1991, two months after the April 2 oral argument. Their motion asserted a disqualifying "appearance of partiality" in the remarks by and about Judge Kozinski in a *California Lawyer* article and the reassignment of the case to a panel that included Judge Kozinski after the original February 5 argument date was vacated on motion of the EEOC.[25] Petitioners supported their motion with: (1) a copy of the *California Lawyer* cover and article (which was mailed to all members of the California Bar, of which petitioners' lead counsel is a member, on March 1, 1991, a full month before argument); (2) identical affidavits from each petitioner, stating he had read the *California Lawyer* article and swearing that, based on it, "I question [Judge Kozinski's] impartiality in a case such as ours and am concerned that I will not receive a fair hearing before Judge Kozinski"; and (3) an affidavit of petitioners' lead counsel, stating that he mailed the *California Lawyer* article to his clients after oral argument but *not* stating when that article first came to his attention.

Judge Kozinski did not deny the motion to recuse, as petitioners assert, Pet., at 16; Judges Boochever and O'Scannlain did, without Judge Kozinski's participation.[26]

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[25] Continuance was requested due to the hospitalization of the EEOC's counsel. The EEOC asked petitioners to consent to the continuance on January 25, the Friday before the identity of the February 5 panel would be revealed, and they refused. On Monday—after the identity of the February panel (Judges Beezer, Kozinski and Rymer) was revealed—petitioners reversed their position and joined the EEOC in requesting a continuance of the argument.

[26] Petitioners unsuccessfully sought rehearing and rehearing *en banc* of the order denying recusal shortly after that order was entered.

As a threshold matter, the motion was procedurally improper because untimely filed with no explanation, much less "good cause," offered to excuse the delay. *See United States* v. *Branco*, 798 F.2d 1302, 1304-05 (9th Cir. 1986) (citing cases). The identity of the April 2 panel was made public on March 25, yet petitioners waited until June 1 to file their motion. They thus failed to assert disqualification "at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim," as is required; instead, they proceeded to argument, thus "participat[ing] in a substantial manner" in the proceeding and ensuring that the motion could not thereafter be granted without a significant "waste of judicial resources." *Apple* v. *Jewish Hospital & Medical Center*, 829 F.2d 326, 333-34 (2d Cir. 1987) (*citing Branco*, *supra*, and *United States* v. *Studley*, 783 F.2d 934 (9th Cir. 1986)). Neither in the Ninth Circuit nor elsewhere is a litigant entitled to "sample the temper of the court"[27] before deciding whether to seek recusal. The untimeliness of petitioners' recusal challenge, without more, sustains the summary order entered by Judges Boochever and O'Scannlain denying petitioners' motion to recuse Judge Kozinski.

But there is more: The motion is substantively frivolous.[28] Petitioners have reproduced the *California Lawyer*

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[27] *United States* v. *Conforte*, 457 F. Supp. 641, 654 n.7 (D. Nev. 1978), *aff'd in pertinent part*, 624 F.2d 869, 879-82 (9th Cir.), *cert. denied*, 499 U.S. 1012 (1980).

[28] Petitioners' attack on Judge Kozinski's qualifications is typical of petitions that bring ill-founded disqualification issues to this Court in last-ditch attempts to secure reversal of judgments. *Sturman* v. *United States*, No. 91-1376, *cert. denied*, 112 S. Ct. 2964 (1992); *Church of Scientology International* v. *United States District Court*, No. 91-1376, *cert. denied*, 112 S. Ct. 2273 (1992); *Krain* v. *Nadler*, No. 91-1579, *cert. denied*, 112 S. Ct. 1953 (1992) (*pro se*); *Stephens* v. *McKinney*, No. 91-931, *cert. denied*, 112 S. Ct. 1167 (1992) (*pro se*); *Alexander* v. *Los Angeles County*, No. 91-624, *cert. denied*, 112 S. Ct. 637 (1991) (*pro se*); *Hanft* v. *Camar Realty Corp.*, No. 91-421, *cert. denied*, 112 S. Ct. 376 (1991) (*pro se*); *Polyak* v. *Boston*, No. 90-1797, *cert. denied*, 112 S. Ct. 63 (1991) (*pro se*); *Moeller* v. *United States*, No. 90-216, *cert.* denied, 111 S. Ct. 151 (1990) (*pro se*).

article in the appendix to their petition. It consists of excerpts of judicial opinions authored by Judge Kozinski; statements by others about Judge Kozinski, mostly laudatory but some not; and a single statement—"I'm still a tough boss"—attributed to him in the context of his then-current ruminations on his tenure at the Merit Systems Protection Board in the early 1980s.

The disqualification statute upon which petitioners rely, 28 U.S.C. § 455(a), "summons a disqualification not merely when the judge's impartiality might somehow be questioned, but only when it may *reasonably* be questioned." *United States* v. *Haldeman*, 559 F.2d 31, 133 n.297 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977) (emphasis in original). The test is objective and not influenced by the "subjective feelings or 'beliefs' of the movants." *McCann* v. *Communications Design Corp.*, 775 F. Supp. 1506, 1524 (D. Conn. 1991); *State of Idaho* v. *Freeman*, 507 F. Supp. 706, 733 (D. Idaho 1981).

Judge Kozinski's "prior judicial determinations and inferences drawn therefrom," as excerpted and discussed in the *California Lawyer*, "are not grounds for recusal." *United States* v. *Mitchell*, 377 F. Supp. 1312, 1318 (D.D.C. 1974); *United States* v. *Conforte*, 624 F.2d, at 882 ("[a] judge's views on legal issues may not serve as the basis for motions to disqualify"). Statements by others to the press about a judge likewise are irrelevant. *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981); *Hodgson* v. *Liquor Salesman's Union Local No. 2*, 444 F.2d 1344, 1349 (2d Cir. 1971) ("If mere rumor, gossip or general conclusory opinions were sufficient [to warrant recusal,] any party could reject any judge at will.") And if Judge Kozinski's statement about still being a "tough boss" disqualified him from all employment cases, it is difficult to imagine how many sitting federal judges would not be similarly disqualified in broad classes of cases routinely litigated in the federal courts. Judges do not lose their humanity upon appointment to the bench. *In re J. P. Linahan*, 138 F.2d 650, 651-54 (2d Cir. 1938) (if "bias" and "impartiality" are "defined to mean the total absence of preconceptions

in the mind of the judge, then no one has ever had a fair trial and no one ever will"); *see Phillips* v. *Joint Legislative Committee on Performance & Expenditure Review*, 637 F.2d 1014, 1020-21 (5th Cir. 1981), *cert. denied sub nom. Mississippi* v. *Phillips*, 456 U.S. 960 (1982) (allegations that, if accepted, would have disqualified judge from entire class of cases do not state legitimate basis for recusal and arguably impinge the constitutional safeguards that prohibit a judge's removal from office save by impeachment).

Petitioners' argument about the panel reassignment is equally frivolous. Litigants have no vested rights in the procedures whereby cases are assigned. *United States* v. *Torbert*, 496 F.2d 154, 157 (9th Cir.), *cert. denied*, 419 U.S. 857 (1974). Judge Kozinski's assignment to the February panel was by lot. Consistent with petitioners' repeated insistence that Hilton's appeal be expedited to the extent possible, the Clerk apparently reassigned the case for argument at the court's next sitting, consistent with giving all members of the new panel sufficient time to prepare for argument. The happenstance of the hospitalization of the EEOC's counsel and the continuance of the first argument after the identity of the February panel was revealed did not give petitioners "a negative veto," *In re United States*, 666 F.2d, at 694, over Judge Kozinski's participation in this case. Yet, that is what petitioners' panel reassignment argument, if accepted would require this Court to hold. "Litigants ought not have to face a judge where there is a reasonable question of impartiality, *but they are not entitled to judges of their own choice.*" H.R. Rep. No. 1453, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code, Cong. & Admin. News 6355 (emphasis added).

"[T]he Court of Appeals is in a better position to evaluate the significance [of a claimed violation of section 455] than is this Court." *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 862 (1988). The summary rejection by Judges Boochever and O'Scannlain of petitioners' untimely and frivolous disqualification challenge was correct and does not warrant the attention of this Court.

III. CONCLUSION

This case raises no important issue of federal law, let alone one upon which there is any identified disagreement among the courts of appeals. Review should be denied.

September 9, 1992

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case Nos. 90-15424, 90-15460, 90-15623

JOHN L. BROOKS, et al.,
Plaintiffs/Appellees/
Cross-Appellants,

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Intervenor/
Appellee/Cross-Appellant

v.

HILTON CASINOS, INC., et al.,
Defendants/Appellants/
Cross-Appellees.

Appeal From The
United States District Court For
The District Of Nevada

BRIEF OF APPELLEES/CROSS-APPELLANTS

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[42]

c. Certification of Issues to the Nevada Supreme Court is Unwarranted.

Hilton argues that, if plaintiffs, emotional distress claim is upheld, the issue of whether it is preempted by the Nevada Industrial Insurance Act, (hereafter "NIIA") Nev. Rev. Stats. § 616.370, should be certified to the Nevada Supreme Court.

The District Court held that plaintiffs' claim would not be preempted by the NIIA. The Court did not exceed its authority in making this determination as to the law of the state. See *King v. Penrod Drilling Co.*, 652 F.Supp. 1331, 1333 (D. Nev. 1987), citing *Dimidowich v. Bell and Howell*, 803 F.2d 1473, 1482 (9th Circuit, 1986). Judge Foley's ruling in this case is consistent with that of another District Court, sitting in Nevada, which held that, although a negligence action would be preempted by the NIIA, intentional tortious conduct is not preempted. See *King v. Penrod Drilling Co.*, supra, at 1333; see also *Wolber v. Service Corp. Int'l*, 612 F.Supp. 235 (D.Nev. 1985).

This is not an issue of such critical and fundamental importance that the District Court could not reasonably exercise its judgment on the applicable law. It is not a new and novel [43] issue. It has been addressed by many courts. The District Court had substantial relevant authority, from Nevada and elsewhere, to rely upon for guidance.[61] Thus certification of this or any other issue is unwarranted.

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[61] The same is true with respect to recognition of an intentional infliction of emotional distress claim in the employment context which Hilton argues (at p. 40 of its brief) should also be certified to the Nevada Supreme Court. See discussion, supra, § C.2.a.